

## REMARKS

In the Office Action dated October 30, 2003, claims 39-45 and 50-85 were pending. Claims 1-38 and 46-49 were previously cancelled in the response to the restriction requirement. In the Office Action, claims 50, 51, 53-57, 62-64, 66, 67, 69, 73, 74, 78, 83 and 84 were rejected, claims 60-61 and 80-81 were objected to, claims 39-45 were allowed, and claims 52, 58-61, 65, 68, 70-72, 75-77, 79-82, and 85 were indicated to be allowable if rewritten to include all of the limitations of the base claim and any intervening claims. In this response, claims 60, 62, and 80 have been amended, and claims 86-118 have been added. Reconsideration of the present application as amended, including claims 39-45 and 50-118 is respectfully requested.

Claims 60 and 61 and claims 80 and 81 were objected to since each of claims 60 and 80 included more than one occurrence of the phrase "includes placing". One of the occurrences of "includes placing" has been deleted from each of these claims. Withdrawal of the objections to claims 60 and 61 and claims 80 and 81 is respectfully requested.

Claims 50, 51, 53-57, 62-64, 66, 67, 69, 73, 74, 78, 83 and 84 were rejected under 35 USC §102(e) as being anticipated by U.S. Patent No. 6,387,130 to Stone et al. As an initial matter, it is noted that Stone et al. is provisionally prior art under 35 USC §102(e). Applicants reserve the right to swear behind the filing date of Stone et al. in this application or in any continuing applications.

Assuming arguendo that Stone et al. is prior art, it does not disclose at least one of the elements recited in each of claims 50, 51, 53-57, 62-64, 66, 67, 69, 73, 74, 78, 83 and 84, and therefore cannot anticipate these claims. For example, claim 50 recites "applying

pushing and pivoting forces to the implant to position the implant through the opening and in the disc space along a non-linear insertion path.” Stone et al. does not disclose these features of claim 50. In contrast, Stone et al. only discloses applying a pushing force or a pulling force to the implant to position it in the disc space. The Office Action asserts that the implant segments pivot due to the curvature of elongate member 30. It is respectfully submitted that such is not disclosed in Stone et al. Rather, Stone et al. discloses that elongate member 30 is “a cord, string, tether or suture which is used to hold together the plurality of intervertebral implants such that together they form an implant assembly....” See col. 1, lines 62-64. In order to pivot the implant segments, Stone et al. discloses the “implants have ends which are angled such that when the implants are pulled or pushed together, they will tend to form a generally C-shaped assembly....” See col. 1, line 66 to col. 2 line 3; *see also* col. 3, line 66 to col. 4, line 12. Accordingly, Stone et al. does not disclose applying pivoting forces to the implant, but rather merely pushing or pulling the implant segments such that the segments act upon one another to pivot. As such, Stone et al. does not disclose the recited features of claim 50, and claim 50 is allowable.

Claims 51, 53-57 and 61 depend directly or indirectly from claim 50, and are allowable at least for the reasons claim 50 is allowable. Accordingly, withdrawal of the rejection of these claims is hereby solicited.

Amended claim 62 recites “pushing a trailing end of the implant through the opening and into the disc space; and pivoting the implant in the disc space through a force applied to the trailing end of the implant to move the implant in the disc space and to position the leading end of the implant in a distal portion of the disc space and to position a trailing end of the implant at a proximal portion of the disc space to bi-laterally support vertebrae on

each side of the disc space.” Stone et al. does not disclose applying a pivoting force to the trailing end of the implant. As discussed above with respect to claim 50, Stone et al. only discloses applying a pushing force or a pulling force to the implant to position it in the disc space. In order to pivot the implant segments, Stone et al. discloses the “implants have ends which are angled such that when the implants are pulled or pushed together, they will tend to form a generally C-shaped assembly....” See col. 1, line 66 to col. 2 line 3; see also col. 3, line 66 to col. 4, line 12. Accordingly, Stone et al. does not disclose applying pivoting forces to the implant, but rather merely pushing or pulling the implant segments such that the segments act upon one another to pivot. As such, Stone et al. does not disclose the recited features of claim 62, and claim 62 is allowable.

Claims 63-64, 66, 67, and 69 depend directly or indirectly from claim 62, and are allowable at least for the reasons claim 62 is allowable. Accordingly, withdrawal of the rejection of these claims is hereby solicited.

Claim 73 recites “providing an inserter instrument including a shaft and a bend adjacent a distal end of the shaft; and positioning the implant in the disc space along a non-linear insertion path with the bend of the inserter instrument positioned through the posterior lateral opening and the distal end of the inserter instrument in contact with the implant.” Stone et al. discloses a positioning tools 70 and 64 that include a linear shaft extending to what appears to be a curved tip that pushes against the implant or pulls the implant. Furthermore, Stone et al. does not disclose any inserter with a bend adjacent a distal end of its shaft that is positioned through a posterior lateral opening. Rather, the shafts of the instruments in Stone et al. are linear for insertion through operating cannulas 60, 62.

The Office Action asserts that that the implant segments pivot “due to the curvature of the distal end of elongated member 30.” However, as discussed above with respect to claim 50, elongate member 30 is flexible cord, suture or other device. The implant segments pivot by the angled ends of the implant segments acting upon one another as the implant segments are pushed or pulled in the disc space. Accordingly, since Stone et al. does not disclose “providing an inserter instrument including a shaft and a bend adjacent a distal end of the shaft; and positioning the implant in the disc space along a non-linear insertion path with the bend of the inserter instrument positioned through the posterior lateral opening and the distal end of the inserter instrument in contact with the implant,” claim 73 is not anticipated and withdrawal of this basis of the rejection is respectfully requested.

Claim 74 depends directly from claim 73, and is allowable at least for the reasons claim 73 is allowable. Accordingly, withdrawal of the rejection of this claim is hereby solicited.

Claim 78 recites “positioning a leading end of the implant at the opening; manipulating a first instrument to position the implant through the opening and into the disc space; and manipulating a second instrument to advance the implant distally into the disc space to position the leading end of the implant on a side of the spinal column axis opposite the opening and a trailing end of the implant is positioned on a side of the spinal column axis adjacent to the opening.” Stone et al. does not disclose manipulating a second instrument to advance the implant distally into the disc space. Rather, Stone et al. discloses employing a single instrument to push the implant distally. The second instrument positioning rod 64 is inserted through a second access cannula 62 on the contra-lateral side of the disc space. Positioning rod 64 is used to pull the implant proximally toward the

approach to the disc space taken with the positioning rod 64. There is no disclosure or suggestion of employing a second instrument to advance the implant distally with the second instrument. Accordingly, claim 78 is allowable and withdrawal of this basis of the rejection is respectfully requested.

Claims 83-84 depend directly or indirectly from claim 78, and are allowable at least for the reasons claim 78 is allowable. Accordingly, withdrawal of the rejection of these claims is hereby solicited.

Several additional claims 86-118 are presented in this response to rewrite allowable dependent claims in independent form. For example, claim 86 re-presents original claim 52 in independent form. New claims 87-95 correspond to original dependent claims 53-61, but are renumbered to depend directly or indirectly from claim 86. Accordingly, claims 86-95 have been presented to place allowable subject matter in allowable form, and are thus allowable as indicated in the Office Action.

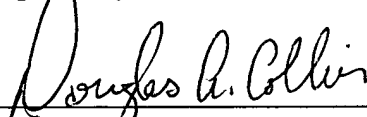
Claim 96 re-presents original claim 58 in independent form. New claims 97-103 correspond to original dependent claims 51-55, 57 and 59, respectively, but are renumbered to depend directly or indirectly from claim 96. Accordingly, claims 96-103 have been presented to place allowable subject matter in allowable form, and are thus allowable as indicated in the Office Action.

Claim 104 re-presents original claim 59 in independent form. New claims 105-108 correspond to original dependent claims 50-51 and 60-61, respectively, but are renumbered to depend directly or indirectly from claim 104. Accordingly, claims 104-108 have been presented to place allowable subject matter in allowable form, and are thus allowable as indicated in the Office Action.

Claim 109 re-presents original claim 65 in independent form. New claims 110-118 correspond to original dependent claims 63-64 and 66-72, respectively, but are renumbered to depend directly or indirectly from claim 109. Accordingly, claims 109-118 have been presented to place allowable subject matter in allowable form, and are thus allowable as indicated in the Office Action.

In view of the above amendments and remarks, claims 39-45 and 50-118 are in condition for allowance. Action towards a Notice of Allowance is respectfully requested. The Examiner is encouraged to contact the undersigned by telephone to resolve any outstanding matters concerning the present application.

Respectfully submitted:



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